FILE COPY

FILED

OCT 12 1936

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 459-460

SOPHIA BRENNAN, ADMINISTRATRIX, ET AL.,
PETITIONERS,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

CHARLES VAN BEECK, ADMINISTRATOR,
PETITIONER,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

M. G. Adams,
H. C. Hughes,
Counsel for Petitioners.

Howth, Adams & Hart,
Lockhart, Hughes & Lockhart,
Of Counsel.

INDEX.

Subject Index.

PETITION.

I. Condensed Statement of Matter Involved..... 2-15
II. Reasons for Allowance of Writ.....16-26

BRIEF.

1. Opinions of Courts Below..... 27
2. Jurisdiction..... 27
3. Date of Decree..... 27
4. Statement of the Case..... 27
5. Specification of Errors..... 27
6. Point One..... 28

"Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, deceased, was entitled to recover the amount of damages accrued from the death of the son to the death of the mother, as found by the commissioner.

(Based on Reasons for Allowance of Writ and Specification of Assigned Errors Nos. 1 and 2.)"

7. Point Two..... 31

"The concurrent fact findings of the commissioner and of the District Court were, under the established practice in this court and in all of the lower courts, binding and conclusive upon the Circuit Court of Appeals.

(Based on Reasons for Allowance of Writ and Assigned Error No. 3.)"

8. Point Three. 39

"In holding that, as a matter of fact, notwithstanding all of the evidence to the contrary, the families would have received only one-half of the money salaries being earned by the decedents, the court below violated the fundamental principle that judgments must be based upon the evidence and not upon mere conjecture.

(Based on Reasons for Allowance of Writ and Assigned Error No. 4.)"

9. Point Four. 42

"The rate of three and one-half per cent (3½%) was shown by the uncontroverted testimony to be the proper and reasonable rate for calculating the present worths of the money contributions, and the Circuit Court, in disregarding this testimony and using six per cent (6%), committed fundamental error.

(Based on Reasons for Allowance of Writ and Specification of Error No. 5.)"

10. Point Five. 49

"If the evidence shows that the parents are qualified, as it does in the case at bar, the pecuniary value of the nurture and loss of intellectual, moral and physical training of the children should be estimated, as a matter of law, from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00); and this is a separate and distinct item from the present worth of the money contributions and should not be subtracted from, but allowed over and above the present worths.

(Based on Reasons for Allowance of Writ and Specifications of Assigned Error Nos. 6 and 7.)"

11. Point Six. 53

"In the Causey claim the father's common-law right to the earnings of his child during minority did not enter into nor become a part of the award made to the father and mother. The evidence shows that the present worth of the minor's actual money contributions of twenty dollars ($20.00) a month during the joint life expectancy was the sum of three thousand four hundred thirty-one and 15/100 ($3,431.15) dollars (R. 215).

(Based on Reasons for Allowance of Writ and Specification of Error No. 8.)"

12. Point Seven. 54

"When the commissioner determined and assessed the amount of the awards the damages became liquidated, subject only to the District Court's approval, and the trial court acted clearly within its reasonable and discretionary powers in finding as a fact, under all the circumstances, that interest should run, and in decreeing that it should run, from the date of the filing of the commissioner's report.

(Based on Reasons for Allowance of Writ and Specification of Assigned Errors Nos. 9 and 10.)"

13. Point Eight. 58

"The undisputed evidence required the commissioner and both courts below to find the amount of damages in accordance with the calculations of present worths of the money contributions to the families; and if commissioners and courts are permitted to use, according to personal predilection, the present worth calculations, based on the necessary elements that are shown in the record by the

uncontroverted testimony, then they can at will wholly disregard such calculations; and there cannot be, in the nature of the matter, any rule as to part of the present worth calculations must be controlling.

(Based on Reasons for Allowance of Writ and Specification of Assigned Error No. 11.)"

14. Conclusion. 64-65

15. Appendix. 66-68

Table of Cases.

Alpha S. S. Corp. vs. Cain, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086. . . . . 23, 65

74 American Law Reports, pages 95 and 103. 51

Bailey vs. Blackmon (CCA 4), 3 F. (2d) 252. 18

Beadle vs. Spencer (decided Apr. 27, 1936), 56 S. Ct. 712. . . . . 22, 65

Briscoe vs. United States (CCA 2), 65 F. (2d) 404. . . . . 20, 24, 51, 60

Brooklyn Eastern District Terminal vs. United States, 287 U. S. 170, 53 S. Ct. 103, 105. . . . 19, 41, 48, 62

Chesapeake & O. Ry. Co. vs. Kelly, 241 U. S. 485, 36 S. Ct. 630. . . . . 5, 19, 33, 35, 44, 57, 60

Chicago, B. & Q. Ry. Co. vs. Wells-Dickey Trust Co., 275 U. S. 161, 48 S. Ct. 73, 72 L. Ed. 216. . . . . 16, 29

Chicago, C. R. Co. vs. Vreeland, 227 U. S. 58, 57 L. Ed. 417 at 423. 51

Chicago, D. G. & B. Transp. Co. vs. Moore (CCA 6), 256 F. 490 at 507. . . . . 22, 56

Chicago, M., St. P. & P. R. Co. vs. Busby (CCA 9), 41 F. (2d) 617. 56

Clyde Steamship Co. (D. C.), 16 F. (2d) 930 (aff. 18 F. (2d) 1015, certiorari denied, 48 S. Ct. 21...24, 60
Commercial Natl. Bank of Independence, Kan. vs. Stockyards Loan Co. (CCA 8), 16 F. (2d) 911... 18
Cortes vs. Baltimore Insular Line, 287 U. S. 367, 375, 53 S. Ct. 173, 77 L. Ed. 368.....23, 56, 65
Crawford vs. Neal, 144 U. S. 585, 12 S. Ct. 759... 17

Davis vs. Schwartz, 155 U. S. 631, 15 S. Ct. 236...17, 36
Deslions vs. La Compagnie, etc., 210 U. S. 95, 52 L. Ed. 973, 28 S. Ct. 664.....24, 57, 64
Drowne vs. Great Lakes Transp. Co. (CCA 2), 5 F. (2d) 59.....24, 25, 60

Emblen vs. Myers, English 6 H. & H 54, 158 Reprint 53..... 65

Fairmont Glass Works vs. Cub Fork Coal Co., 287 U. S. 474, 53 S. Ct. 252..... 22

Hines vs. Mills, 218 S. W. 777 (writ of error denied by Supreme Court of the United States, 41 S. Ct. 447)..... 47

Jamison vs. Encarnacion, 281 U. S. 635, 639, 50 S. Ct. 440, 74 L. Ed. 1082.....23, 65

Kimberly vs. Arms, et al., 129 U. S. 512, 9 S. Ct. 355. 17

Magnum Import Co. vs. Cody, 262 U. S. 159, 43 S. Ct. 531..... 25
Merchants Ins. Co. vs. Baring, 20 Wall. 159, 22 L. Ed. 250.....19, 41
Michigan Central R. Co. vs. Vreeland, Admr., 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417..... 20
Munn, County Treasurer vs. Des Moines Natl. Bank (CCA 8), 18 F. (2d) 269..... 18

Norfolk & W. R. Co. vs. Holbrook, 235 U. S. 625, 35 S. Ct. 143, 145.....18, 41

Packard vs. Southern States Power Co., (CCA 5), 46 F. (2d) 789.....18, 38

Schock vs. Malloy (CCA 8), 26 F. (2d) 621..... 18
Sider vs. General Elec. Co., 238 N. Y. 64, 143 N. E. 792, 34 A. L. R. 156.....17, 30
S. W. Power Co. vs. Price, 180 Ark. 567, 22 S. W. (2d) 373 (cited in 74 A. L. R., pages 85-103)...20, 51
State of Alabama vs. United States, 279 U. S. 229, 49 S. Ct. 266..... 22
The Andrea F. Luckenbach (CCA 9), 78 F. (2d) 827, 828..... 18
The Argo (CCA 9), 210 F. 872.....22, 56
The Arizona vs. Anelich (decided April 27, 1936), 56 S. Ct. 707.....22, 24, 64
The City of Rome (D. C. N. Y.), 48 F. (2d) 341-342. .....17, 30
The Columbia (D. C.), 25 F. (2d) 516 (aff. 25 F. (2d) 518, certiorari denied, 48 S. Ct. 530).....24, 60
The Eastland (CCA 7), 78 F. (2d) 984, 988..... 18, 38
The Ernest H. Meyer (CCA 9), 84 F. (2d) 496 (Federal Advance Sheets, Sept. 14, 1936)..... 18
The June Ames (CCA 2), 66 F. (2d) 415.....18, 38
The Spokane (CCA 2), 294 F. 243, 247.....15, 62
The Vallescura, 293 U. S. 296, 55 S. Ct. 194, 195... 59
United States vs. Boykin (CCA 5), 49 F. (2d) 762. .....21, 24, 60
Union Steamboat Co. vs. Chaffins' Admr. (CCA 7), 204 F. 417.....17, 22, 30, 56
Union Steamboat Co. vs. Fitzgibbon (CCA 7), 261 F. 768. .....22, 56
Warner vs. Goltra, 293 U. S. 155, 157, 160, 55 S. Ct. 46, 79 L. Ed. 254.....23, 65

Statutes Cited and Copied in Appendix.

Federal Employers' Liability Act, 45 U.S.C.A. 51.. 66
Section 33 of the Merchant Marine Act of 1920 (Jones Act), 46 U.S.C.A., Sec. 688..... 66
New Admiralty Rule 43½, 28 U.S.C.A., Sec. 723... 67

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. .....

SOPHIA BRENNAN, ADMINISTRATRIX, ET AL.,
PETITIONERS,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

CHARLES VAN BEECK, ADMINISTRATOR,
PETITIONER,

VS.

SABINE TOWING COMPANY, INC., ET AL.,
RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The petition of Sophia Brennan, administratrix of the estate of William Brennan, deceased; Bertha M. Pyle, administratrix of the estate of Orville Glenn Pyle, de-

ceased; Adolphine Durio, administratrix of the estate of Cyrus Durio, deceased: R. L. Causey, administrator of the estate of Stewart Causey, deceased; Ora Kenney, administratrix of the estate of Joseph Hayden Kenney, deceased; W. M. Crook, administrator of the estate of C. L. Nelson, deceased; Ruth Anderson, administratrix of the estate of H. A. Anderson, deceased; and Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, deceased, petitioning from a final decree of the United States Circuit Court of Appeals for the Fifth Circuit drastically reducing all damages assessed by the commissioner and approved by the trial court, and wholly denying one claim, respectfully shows to this Honorable Court:

I.

CONDENSED STATEMENT OF MATTER INVOLVED.

On January 27, 1930, the tug, Edgar F. Coney, sank in the Gulf of Mexico, resulting in the loss of all the fourteen members of the crew. On June 27, 1930, the Sabine Towing Company, Inc., owner of said tug, filed its petition in the United States District Court for the Eastern District of Texas for "exoneration from or limitation of liability," for the loss of the lives of said crew (R. 2-10). Therein the personal representatives of only eight deceased members of the crew filed their claims on behalf of their respective legal beneficiaries (R. 19-42).

The District Court having entered an interlocutory judgment denying exoneration from or limitation of lia-

bility, holding the owner of the vessel guilty of negligence "with knowledge and privity in sending out a vessel unseaworthy in the respects found by the court" (R. 46-50), and an appeal therefrom being taken to the United States Circuit Court of Appeals for the Fifth Circuit and that court having affirmed the judgment of the court below on the question of liability (with Judge Foster dissenting, 72 F. (2d) 490), and an application for certiorari being made and denied (293 U. S. 611, 55 S. Ct. 141), the assessment of the damages came on for determination in the District Court.

All parties to the litigation in the District Court, consisting of the Sabine Towing Company, Inc., petitioner therein, and all of the claimants, agreed that the assessment of the damages should be made by a commissioner, and themselves unanimously selected Samuel C. Lipscomb, Esquire, a man of undoubted integrity and reputation, and a lawyer of large experience in similar matters, acquired as counsel for corporations, and the court thereupon appointed the said Lipscomb to hear the testimony, to find the facts, assess the damages and report his findings to the court (R. 50).

Said commissioner heard all of the witnesses personally (R. 50-340), except only with respect to the claims of Mrs. C. L. Nelson, whose testimony was by deposition (R. 147-162), and of Charles Van Beeck, administrator, which was by stipulation (R. 163).

The commissioner found the facts and assessed the damages (R. 341-352).

He found the basic facts, in each claim, upon which the mathematical calculations of the present worths of the money contributions to the respective families were properly made. The evidence supporting the following basic fact findings in each case was not in dispute and the commissioner found said facts accordingly, to-wit: First, the amounts being earned by the decedents at the time of their death; second, the ages of the decedents and of their beneficiaries; and, third, their joint life expectancies (R. 348-352).

Another fact element necessary for the calculations of present worths was the amount of money or that part of his earnings each decedent was contributing to his family, that is, what amount he used or probably would use for his personal expenses. This was the only basic fact in dispute. The wives of Brennan, Kenney, Pyle and Durio testifying that the checks for the salaries of their husbands from the Sabine Towing Company were delivered to them respectively for the use of the family and that out of the amount so received, the husband used only the sum of from ten dollars ($10.00) to fifteen dollars ($15.00) a month for personal expenses, and the families used the remainder; and the only controverting evidence being that by Ball, president of Sabine Towing Company, testifying that in his opinion twenty-five dollars ($25.00) to thirty dollars ($30.00) a month would have been a reasonable allowance for the personal expenses of the deceased members of the Coney crew (R. 276). On this fact issue the commissioner agreed with Ball, finding that the per-

sonal expenses of each one of the deceased members of the crew was twenty-five dollars ($25.00) a month (R. 345).

It was undisputed that each of the decedents received as a part of his wages the value of room and board and that this was over and above the money amounts being paid them as salaries (R. 53); said amounts paid them as wages not being in dispute, and found by the commissioner, in each instance, in accordance with the undisputed testimony, to-wit: Brennan, two hundred dollars ($200.00) a month (R. 349); Pyle, one hundred ninety dollars ($190.00) (R. 350); Anderson, seventy-five dollars ($75.00) (R. 350); Durio, one hundred dollars ($100.00) (R. 351); Nelson, sixty-five dollars ($65.00) to eighty dollars ($80.00) (R. 351); Causey, sixty dollars ($60.00) (R. 352).

The only remaining fact element necessarily entering into the present worth calculations of the money contributions is the rate of interest to be used. Mitchell, a thoroughly qualified expert insurance actuary (R. 175-176), testified that three and one-half per cent (3½%) was the reasonable and correct rate of interest to be used (R. 181), based on the general usage of the large insurance companies that make their investments on the expectation of average earnings of three per cent (3%) and (3½%), most of them being on the basis of three per cent (3%) (R. 181, 220, 221, 232). His testimony was not controverted, but was apparently satisfactory to all litigants, and the respondent produced no other actuary. *Chesapeake & O. Ry. Co.* v. *Kelly,* 241 U. S. 485, 36 S. Ct. 630.

The facts as to the earnings of Edward C. Van Beeck, deceased, and his contributions to his mother were stipulated at from thirty dollars ($30.00) to fifty dollars ($50.00) a month (R. 163).

In deference to the commissioner's fact finding that the decedents would more likely have used twenty-five dollars ($25.00) for personal expenses, claimants conceded that amount as a reasonable personal expenditure of each decedent and this renders undisputed all of the fact elements used in making the mathematical calculations to determine the present worths of the money contributions from each decedent to his family; the present worths being, of course, those amounts necessary to purchase annuities, paying the same monthly income the families were receiving from the decedents (Mitchell, R. 182).

Basing his calculations upon these undisputed facts and using both the three and one-half per cent (3½%) deemed proper, and also the six per cent (6%) as arbitrarily used by the Circuit Court, Mitchell's calculations are shown in the following tabulation:

Age of beneficiary and deceased	Probable joint life expectancy	Monthly salaries less $25.00	Present value on American Annuitants Table 3½% value	Present value on American Annuitants Table at 6% value
		Sophia Brennan & Husband		
27-25	24	$175.00	$35,250.76 (R. 218)	$28,735.00 (R. 236)
		Bertha M. Pyle & Husband		
24-34	25	$165.00	$34,226.27 (R. 218)	$27,643.00 (R. 236)
		Adolphine Durio & Husband		
49-50	15	$ 80.00	$11,557.47 (R. 218)	$10,501.00 (R. 236)
		R. J. Causey and Son		
57-19	15	$ 20.00	$ 2,888.92 (R. 214)	$ 2,471.00 (R. 236)
		Ora Kenney & Husband		
34-35	22	$140.00	$26,796.34 (R. 218)	$22,209.00 (R. 236)
		Ruth Nelson & Husband		
39-33	22	$ 40.00	$ 7,658.77 (R. 218)	$ 6,893.00 (R. 236)
		Ruth Anderson & Husband		
45-38	20	$ 65.00	$11,588.92 (R. 218)	$10,213.00 (R. 236)

Mitchell further testified that the above amounts represented the monies that should have been paid immediately upon the death of the decedents, to-wit, on the 28th day of January, 1930; but inasmuch as the amounts were not paid at that time, substantially five years' interest at the same rate used in each instance should be added, because if the amount had been paid when due, the beneficiaries would have been receiving three and one-half per cent (3½%) thereon, or if they had purchased annuities with the amounts shown as the present worths of the contributions, they would have been receiving from the insurance company their respective monthly contributions (R. 183-187).

With the five years' interest added, as calculated by Mitchell, the respective amounts representing the true present worths at three and one-half per cent (3½%) and at six per cent (6%) at the time of hearing before the commissioner are as follows:

True present value at 3½% with five years accumulated interest added.		True present value at 6% with five years accumulated interest added.
	Sophia Brennan & Husband	
$41,866.98 (R. 219)		$38,454.00 (R. 236)
	Bertha M. Pyle & Husband	
$40,650.20 (R. 219)		$36,993.00 (R. 236)
	Adolphine Durio & Husband	
$13,726.69 (R. 219)		$13,053.00 (R. 236)

R. J. Causey & Son	
$ 3,431.15 (R. 215)	$ 3,307.00 (R. 236)
Ora Kenney & Husband	
$31,825.75 (R. 219)	$29,721.00 (R. 236)
Ruth Nelson & Husband	
$ 9,096.24 (R. 219)	$ 8,224.00 (R. 236)
Ruth Anderson & Husband	
$13,764.04 (R. 219)	$13,667.00 (R. 236)

The commissioner found and assessed the damages to which the petitioners were entitled as follows:

To Sophia Brennan, Administratrix, $21,000.00 (R. 349), apportioned:

Sophia Brennan	$15,000.00	
Audrey Brennan	1,500.00	
William Brennan, Jr.	2,000.00	
Gloria Jean Brennan	2,500.00	(R. 349).

To Bertha M. Pyle, Administratrix, $20,000.00 for her sole use and benefit (R. 350).

To Adolphine Durio, Administratrix, $9,000.00, apportioned:

Adolphine Durio	$ 7,500.00	
Mildred Durio	400.00	
Earline Durio	500.00	
Joseph Durio	800.00	(R. 351).

To R. J. Causey, Administrator, $3,000.00, apportioned:

R. J. Causey	$ 1,500.00	
Mrs. Myrtis Causey	1,500.00	(R. 352).

To Ora Kenney, Administratrix, $20,000.00, apportioned:

Ora Kenney	$15,300.00
Joseph Hayden Kenney	2,000.00
Kathleen Kenney	2,700.00 (R. 348-349).

To W. M. Crook, Administrator, $7,500.00, for the sole use and benefit of Ruth Nelson (R. 351).

To Ruth Anderson, Administratrix, $11,000.00 for the sole use and benefit of Ruth Anderson (R. 350).

To Chas. Van Beeck, Administrator, $700.00, same being amount of damages accruing to Mrs. Jennie Royakers (mother of deceased) up to the time of her death, July 31, 1931 (R. 353).

All parties duly filed exceptions to the commissioner's findings (those by Sabine Towing Company, R. 353-359; those by claimants, R. 360-389).

The principal complaints of the claimants were: First, that the commissioner had refused to find the respective present worths of the undisputed money contributions, calculated on bases shown by the uncontroverted evidence, but had arbitrarily and conjecturally reduced said amounts to almost one-half; second, that he had erroneously deducted the amount of damages allowed the minors from the present worths of the money contributions to the family; and, third, that he committed error in not awarding the minor in each instance a sum of from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00) for the loss of the pecuniary

value of the nurture and of the intellectual, moral and physical training (R. 372).

The trial court overruled all of the exceptions to the commissioner's report and entered the following order:

"Upon a careful consideration of all the facts introduced upon the question of damages before the commissioner, Hon. Samuel C. Lipscomb, and after the full consideration of the report of the said commissioner heretofore filed herein, I overrule all exceptions to said report and adopt the findings of the said commissioner as my findings and herewith file the following findings of fact and conclusions of law." Then followed the trial court's specific findings of fact in each claim (R. 391-395), and then his conclusions of law of the tenor following:

"I conclude, as a matter of law, that the personal representatives of Joseph H. Kenney, William Brennan, O. G. Pyle, H. A. Anderson, C. Durio, C. L. Nelson, Stewart Causey and Edward Van Beeck, be and they are entitled to recover the damages hereinabove found with interest thereon at six per cent from the date of the filing of the commissioner's report" (R. 395-396); and final decree was entered in accordance therewith, except that the trial court wholly denied the claim of Charles Van Beeck, administrator, and refused him any recovery (final decree, R. 396-400).

From this judgment the Sabine Towing Company appealed and your petitioners duly filed and prosecuted in said appeal their cross assignments of error based

on their exceptions to the commissioner's report and to the trial court's action in denying any damages to Charles Van Beeck, administrator (R. 407-417).

Charles Van Beeck, administrator, perfected his appeal from the trial court's final judgment denying him any recovery (R. 430-444). The United States Circuit Court of Appeals for the Fifth Circuit heard and decided both of said appeals together and rendered its decision affirming that part of the judgment of the District Court, denying damages to Charles Van Beeck, administrator; reduced the damages adjudged by the lower court to all of the other petitioners to about one-half of that recommended by the commissioner and allowed by the District Court; and reversed and rendered that part of the judgment below allowing interest to the claimants at six per cent on their judgments from the date of the filing of the commissioner's report, to-wit, the 28th day of February, 1935 (R. 447-455).

The amounts of the money contributions being made to the respective families, in each case, were conclusively established by the undisputed testimony, as above shown; but the Circuit Court of Appeals wholly disregarded this evidence and arbitrarily set its own standard of one-half of the earnings of the decedents as being the probable money contributions to the families; and this is expressly shown by the following excerpt from the opinion:

> "Assuming the testimony of the widows to be truthful, it is beyond dispute that the husbands, upright, faithful and devoted, derived as much benefit from the upkeep and happiness of the family as did

the wives. We consider it to be a fair estimate to say the family had lost an amount equivalent to one-half of what the husband and father had earned" (R. 450).

The Circuit Court based its calculations of the damages, in each instance, on its said arbitrary standard arrived at without any supporting evidence whatever that the families would receive only one-half of their decedent's salaries and reduced all of the amounts assessed by the commissioner and adjudged to the claimants by the District Court, in some instances by about one-third and in others more than one-half; the amounts allowed by the Circuit Court of Appeals being as follows:

To Sophia Brennan, Administratrix, $15,250.00, apportioned:

Sophia Brennan	$12,250.00
Audrey Brennan	1,000.00
William Brennan, Jr.	1,000.00
Gloria Jean Brennan	1,000.00

To Bertha M. Pyle, Administratrix, $14,750.00, for her sole use and benefit.

To Adolphine Durio, Administratrix, $5,250.00, apportioned:

Adolphine Durio	$ 3,750.00
Mildred Durio	500.00
Earline Durio	500.00
Joseph Durio	500.00

To R. J. Causey, Administrator, $1,000.00, apportioned:

R. J. Causey	$500.00
Mrs. Myrtis Causey	500.00

To Ora Kenney, Administratrix, $12,250.00, apportioned:

Ora Kenney	$10,250.00
Joseph Hayden Kenney	1,000.00
Kathleen Kenney	1,000.00

To W. M. Crook, Administrator, $3,000.00, for the sole use and benefit of Ruth Nelson.

To Ruth Anderson, Administratrix, $4,750.00, for her sole use and benefit.

As to Charles Van Beeck, Administrator, the judgment against him was affirmed.

That the final awards *prima facie* are unjust is demonstrated by the fact that though it has been more than six and one-half years since the death of the decedents, during all of which time the beneficiaries should have been receiving their monthly contributions, the Circuit Court, as expressly appears from its opinion, reduced the money contributions that should have been received up to the present by calculating the present worths thereof, as if the whole amount were paid as of January 28, 1930, whereas, the full amounts of said contributions to date of judgment should have been allowed together with interest thereon; and then the present worths of the said money contributions should have been calculated from the date of the judgment to the expiration of the respective joint life expectancies.

What the beneficiaries have actually lost up to the present time is not a matter of theory, but of mathe-

matical fact, as clearly appears from simple calculations as follows:

At the time the judgment of the Circuit Court of Appeals was rendered, based on the family income of one hundred seventy-five dollars ($175.00) a month, the petitioner, Sophia Brennan and her three minor children had lost in six and one-half years thirteen thousand six hundred fifty dollars ($13,650.00) with more than seventeen years left of their unexpired term of their joint life expectancy; from a family income of one hundred sixty-five dollars ($165.00), the petitioner, Bertha M. Pyle, had lost the sum of twelve thousand eight hundred seventy dollars ($12,870.00) with more than eighteen years left of the unexpired term of their joint life expectancy; Adolphine Durio and her three minor children had lost five thousand eight hundred fifty dollars ($5,850.00) with more than eight years left of the unexpired term of their joint life expectancy; R. J. Causey and wife had lost one thousand five hundred sixty dollars ($1,560.00) with more than eight years left of the unexpired term of their joint life expectancy; Ora Kenney and her three minor children had lost ten thousand nine hundred twenty dollars ($10,920.00) with more than fifteen years left of the unexpired term of their joint life expectancy; Ruth Nelson had lost more than three thousand one hundred twenty dollars ($3,120.00) with more than fifteen years left of the unexpired term of their joint life expectancy; and Ruth Anderson had lost five thousand seventy dollars ($5,070.00) with more than twelve years left of the unexpired term of their joint life expectancy. *The Spokane* (CCA 2), 294 F. 243, 247.

Judge Foster, who wrote the dissenting opinion on the issue of liability in the first appeal, was the only member of the court who heard both appeals.

II.

REASONS FOR ALLOWANCE OF WRIT.

1. Both courts below erred with respect to the Van Beeck claim in holding that the personal representative of Edward C. Van Beeck, deceased, was not entitled to recover for the benefit of the estate of Jennie Royakers, the mother of deceased, for the value of the probable money contributions from the date of the son's death up to the date of the mother's death, for that, as shown by the undisputed evidence, the said Edward C. Van Beeck was unmarried, left no surviving widow nor children, and his mother being the sole surviving member of the next class of beneficiaries named in the statute and entitled to recover, and in whom immediately vested a cause of action at her son's death, and her personal representative having filed and prosecuted the claim for her benefit up to the date of her death, was entitled to recover (U.S.C.A., Title 45, Section 51). Both courts based their erroneous conclusion upon their misconstruction of the case of *Chicago, B. & Q. Ry. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, 48 S. Ct. 73, 72 L. Ed. 216. In this case the Supreme Court has, we think, settled the proper construction of said statute with respect to the right of the beneficiaries named in the statute to recover damages up to the time of the death of the beneficiary, and settled it (at least by implication) contrary to the holding of the lower courts; but if not, then the Circuit Court of Appeals "has decided an important question of federal law, which has not been, but should be, settled by this court."

2. Such holding of the Circuit Court of Appeals with respect to the Van Beeck claim is in conflict with decisions of another Circuit Court of Appeals and of a District Court; and said court has thus "decided an important question of general law in a way probably untenable and in conflict with the weight of authority," as shown by the following decisions: *Union Steamboat Co.* v. *Chaffins' Administrators* (CCA 7), 204 F. 417; *The City of Rome*, (D. C. N. Y.) 48 F. (2d) 341-342; *Sider* v. *General Electric Co.*, 238 N. Y. 64, 143 N. E. 792, 34 A. L. R. 156.

3. The Circuit Court of Appeals erred in failing "to give to the findings of the commissioner the weight to which they were entitled and in refusing to treat them as correct, binding and conclusive and not to be disturbed unless clearly in conflict with the weight of the evidence upon which they were made," the said commissioner having heard all of the witnesses personally except as to the Nelson and Van Beeck claims, and all of his findings having been expressly approved by the District Court after review by that court of the testimony, and all of the said fact findings being based either upon the undisputed testimony or the overwhelming preponderance thereof, and all parties having assented to the reference of said matters to a commissioner and having unanimously agreed upon the person to be appointed by the court; and such action on the part of the Circuit Court of Appeals is clearly in conflict with the following decisions: *Kimberly* v. *Arms, et al.*, 129 U. S. 512, 9 S. Ct. 355; *Davis* v. *Schwartz*, 155 U. S. 631, 15 S. Ct. 236; *Crawford* v. *Neal*,

144 U. S. 585, 12 S. Ct. 759; *The Eastland*, (CCA 7) 78 F. (2d) 984, 988, and cases cited; *The June Ames*, (CCA 2) 66 F. (2d) 415; *Packard* v. *Southern States Power Co.*, (CCA 5) 46 F. (2d) 789; *Schock* v. *Malloy*, (CCA 8) 26 F. (2d) 621; *Commercial Natl. Bank of Independence, Kan.* v. *Stockyards Loan Co.*, (CCA 8) 16 F. (2d) 911; *Bailey* v. *Blackmon*, (CCA 4) 3 F. (2d) 252; *Munn, County Treasurer* v. *Des Moines Natl. Bank*, (CCA 8) 18 F. (2d) 269; *The Ernest H. Meyer*, (CCA 9) 84 F. (2d) 496 (Federal Advance Sheets, Sept. 14, 1936); *The Andrea F. Luckenbach*, (CCA 9) 78 F. (2d) 827, 828.

4. The Circuit Court of Appeals found as a fact, without any evidence whatever in the record on which to base the finding, that the families would have received only one-half of the money salaries being earned by the decedents and therein grossly erred to the detriment of petitioners in violating a leading fundamental principle of our jurisprudence, which requires that all judgments be based on proof and substantial evidence as an absolute condition precedent to their validity. If this unsupported fact finding be permitted to stand, said finding will become a settled principle of law and a yardstick to measure and control all similar cases in the future. In this arbitrary act, the court below "indulged in conjecture instead of weighing established facts," and "so far departed from the accepted and usual course of judicial proceedings, as earnestly to call for the exercise of this Honorable Court's power of supervision." *Norfolk & W. R. Co.* v. *Holbrook*, 235 U. S. 625, 35 S. Ct. 143, 145;

Merchants Ins. Co. v. *Baring,* 20 Wall. 159, 22 L. Ed. 250; *Brooklyn Eastern District Terminal* v. *U. S.,* 287 U. S. 170, 53 S. Ct. 103, 105.

5. The lower court also grossly erred in finding as a fact, without any evidence to support it, and notwithstanding the uncontroverted evidence to the contrary, that six per cent was the just and reasonable rate as a basis for calculating the present worths of the money contributions, instead of the three and one-half per cent, as shown by the undisputed testimony of Mitchell, the actuary, as being the reasonable rate, all facts and circumstances considered; and in thus arbitrarily indulging in mere conjecture, instead of following the evidence, said court "so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this court's power of supervision." Cases, *supra;* and *Chesapeake & O. R. Co.* v. *Kelly,* 241 U. S. 485, 36 S. Ct. 630.

6 The court below erroneously held that the children had only a right of "theoretical pecuniary recovery" for the loss of the father's care and guidance and carried this erroneous theory into practice by refusing to render judgment in favor of the minors for reasonable and proper amounts for the pecuniary value of the nurture of the child and for the loss of its intellectual, moral and physical training by allowing only from five hundred dollars ($500.00) to one thousand dollars ($1,000.00) for each of the minors. This is in conflict with the weight of authority holding that the value of such training, if the

evidence shows the parent qualified, as it does in the case at bar, should be and usually is estimated at from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00), as shown by the following decisions: *Michigan Central R. Co.* v. *Vreeland, Administrator,* 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417; *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404; *S. W. Power Co.* v. *Price,* 180 Ark. 567, 22 S. W. (2d) 373 (cited in 74 A. L. R., pages 95-103).

7. Both lower courts erred in subtracting the amounts awarded for the loss of reasonable pecuniary value of the nurture of the children and for their loss of intellectual, moral and physical training, from the present worths of the money contributions awarded to the families, thus penalizing the widows who had children and giving them the smallest awards, whereas, such sum should have been awarded as separate and distinct items of recovery and over and above the present worths of the money contributions. This error strongly calls for the exercise of this court's power of supervision. *Michigan C. R. Co.* v. *Vreeland,* 227 U. S. 58, 73, 57 L. Ed. 417, 423; *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404.

8. The Circuit Court erroneously assumed, with respect to the Causey claim, that the parents' common-law right to the minor's earnings entered into and became a part of the award recommended by the commissioner and allowed by the District Court, whereas, on the contrary, the said award was clearly based exclusively on the present worth of the twenty dollars ($20.00)

actual money contribution being made by the son to the father and mother, as shown by the testimony of the father, which was not disputed, nor in any way discredited; and though the commissioner did mention the right of the parents to their son's earnings during minority, it is evident that this did not enter into his estimate of the amount to be awarded, as shown by the commissioner's statement as follows: "The father testified that at times the son sent him twenty dollars ($20.00) per month, at other times twenty-five dollars ($25.00). The father was infirm. The boy was bright and intelligent and showed an affectionate regard for his parents and it is but natural to assume that he would have been of material assistance to them, *regardless of any legal obligation for their support.* Taking into consideration his natural affection, his prospects for future advancements and personal services he might render to his aged parents in their declining years, the award in this case is fixed at three thousand dollars ($3,000.00)" (R. 352). The present worth of the twenty dollars ($20.00) contribution during the probable joint life expectancy of fifteen years is three thousand four hundred thirty-one and 15/100 dollars ($3,431.15) (R. 215). *United States* v. *Boykin* (CCA 5), 49 F. (2d) 762 (involving substantially similar facts and same court awarded five thousand two hundred dollars ($5,200.00), in striking contrast with that allowed the Causeys.

9. The Circuit Court of Appeals erred in reversing and rendering that part of the judgment of the District Court awarding interest on the respective amounts ad-

judged to the petitioners from the date of the filing of the commissioner's report, for that, the District Court, in awarding said interest, was acting within its judicial discretion, and there being no evidence of abuse of discretion, and none being found by the Circuit Court, such holding is in direct conflict with the following decisions: *Union Steamboat Co.* v. *Chaffins' Administrators* (CCA 7), 204 F. 412 at 420; *Chicago D. G. & B. Transp. Co.* v. *Moore* (CCA 6), 256 F. 490 at 507; *Union Steamboat Co.* v. *Fitzgibbon* (CCA 7), 261 F. 768; *The Argo* (CCA 9), 210 F. 872; *Fairmont Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 53 S. Ct. 252; *State of Alabama* v. *United States*, 279 U. S. 229, 49 S. Ct. 266.

10. Apparently the Supreme Court has not passed upon the question of whether or not interest can properly be allowed from the date of the filing of the commissioner's report and assessment of damages in causes arising under the Jones Act and that part of the Employers' Liability Act incorporated and made a part of it by reference (46 U.S.C.A., Section 688, and 45 U.S.C.A., Section 51); but it is a matter of such importance that it should be determined by this Honorable Court in the light of its liberal construction of said statutes to attain the remedial ends of such legislation "for the benefit and protection of seamen who are peculiarly the wards of admiralty;" some of the decisions of this Honorable Court involving other but related matters, giving such liberal construction to said statutes, being: *The Arizona, et al.* v. *Anelich* (decided April 27, 1936), 56 S. Ct. 707; *Beadle* v. *Spencer* (decided April 27, 1936), 56 S. Ct.

712; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375, 53 S. Ct. 173, 77 L. Ed. 368; *Jamison* v. *Encarnacion*, 281 U. S. 635, 639, 50 S. Ct. 440, 74 L. Ed. 1082; *Alpha S S. Corp.* v. *Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086; *Warner* v. *Goltra*, 293 U. S. 155, 157, 160, 55 S. Ct. 46, 79 L. Ed. 254.

In reversing the District Court's judgment allowing interest from the date of the filing of the commissioner's report, the Circuit Court of Appeals construed the said statutes strictly and in brusque contrast with the spirit of this court's decisions, *supra*; and the case it cites in support of this part of its decision, to-wit, *Cortes* v. *Baltimore Insular Line*, 66 F. (2d) 526, has no application, since that case involved the allowance of interest from the date of the injuries and not from the date of the filing of the commissioner's report. There is nothing in the statute, either express or implied, inhibiting the allowance of interest either from the date of the injuries or from the date of the filing of the commissioner's report, and the decision below could have been reached only by an unnecessarily strict construction of said statute; the lower court itself saying, "in admiralty the allowance of interest is discretionary with the court" (R. 455).

11. The Circuit Court erred in refusing to increase, instead of reducing the awards—and this applies particularly with respect to the widows and children—so as to make them reasonably commensurate with the undisputed testimony and to harmonize with the present worths as correctly calculated on undisputed bases, and

to render them in reasonable accord with damages allowed in other decisions in the various Circuits involving substantially similar facts; this contention not being inconsistent with the rule of practice that the facts and awards found by the commissioner and approved by the District Court are conclusive in the respect that the said awards cannot be reduced, inasmuch as, under the undisputed evidence, the present worths of the money contributions were in each case from a third to a half larger than the awards made by the commissioner and the District Court; and in no decided cases, within our knowledge, have the awards for damages been reduced below the present worths of the money contributions based on joint life expectancies and the other appropriate mathematical elements, as shown in the following decisions: *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404; *In re Clyde Steamship Co.* (D. C.), 16 F. (2d) 930 (aff. 18 F. (2d) 1015, certiorari denied, 48 S. Ct. 21); *The Columbia* (D. C.), 25 F. (2d) 516 (aff. 25 F. (2d) 518, certiorari denied, 48 S. Ct. 530); *Drowne* v. *Great Lakes Transp. Co.* (CCA 2), 5 F. (2d) 59; *United States* v. *Boykin* (CCA 5), 49 F. (2d) 762.

12. The decision in this case is one of extreme importance not only to petitioners, but to all seamen and their families and beneficiaries throughout the United States, because it defines and limits with a "tight and grudging hand" (*Deslions* v. *La Compagnie, etc.*, 210 U. S. 95, 52 L. Ed. 973. 28 S. Ct. 664), their ultimate rights under the remedial federal statutes aforesaid, which this court has repeatedly held must be construed liberally for the benefit and protection of seamen as "the wards of admiralty." *The Arizona* v. *Anelich, supra.* The decision below ruthlessly reduces them from this high estate of "protected wards" to the low estate of "mis-

treated orphans." It palpably disregards the rule of liberal policy laid down by this court for guidance of the courts below. It absolutely destroys, from inception, those causes of action that have vested by operation of statute and abates them immediately upon the death of the beneficiaries; and if this decision be permitted by this Honorable Court to stand as law, it will result inevitably that because of prolonged delays peculiar to this class of litigation, not a few of such claims will be automatically settled by death, to the profit of the wrongdoer.

This Honorable Court should grant the writ, in this case, not only to correct the many errors above shown, but also "to secure that uniformity of decision" among the lower courts with respect to amounts of damages allowed seamen and their families under substantially the same or similar facts. *Magnum Import Company* v. *Cody*, 262 U. S. 159, 43 S. Ct. 531. In contrast with other awards in the various Circuits, this decision, in its cruel cuts of the already meager awards assessed by the commissioner and approved by the trial court, is distinctly a throwback to the "Dark Ages" for seafarers and their dependents—strangely out of step with the liberal trend of modern judicial thought. Merely as illustrative of this progressive liberalism we cite one of many cases, *Drowne* v. *Great Lakes Transp. Co.* (CCA 2), 5 F. (2d) 59, in which the Second Circuit said:

> "We note that with the increase in the cost of living, awards have been larger. The widow who must live without the aid of her husband is necessarily confronted with the increase in the cost of living and of her children. In the administration of justice, it is the purpose of the law to compensate the dependents as fully as money can for the loss sustained."

Wherefore, your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and to send this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket, No. 7876, Sabine Towing Company, Inc., *et al*, appellants vs. Sophia Brennan, *et al*, appellees, and No. 7977, Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, cross appellant, vs. Sabine Towing Company, Inc., *et al*., cross appellees, and that the said decree of the United States Circuit Court of Appeals and of the United States District Court may be both reformed and amended or reversed and rendered in accordance with the foregoing petition, as the case may be, by this Honorable Court, and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem just.

M. G. Adams,
H. C. Hughes,
Counsel for said Petitioners.

Howth, Adams & Hart,
Lockhart, Hughes & Lockhart,
Of Counsel.

We certify that we have examined and are familiar with the contents of the foregoing petition; that in our opinion it is well founded and entitled to favorable consideration by the court and that it is not filed for the purpose of delay.

M. G. Adams,
H. C. Hughes.

BRIEF IN SUPPORT OF FOREGOING PETITION FOR WRIT OF CERTIORARI.

Opinions of Courts Below.

The decree of the Circuit Court of Appeals, Fifth Circuit, dated August 14, 1936, is found at R. 447-455, but not yet reported.

The decree of the District Court (E. D. Texas), dated July 18, 1935, is found at R. 396, but was never reported.

The commissioner's report and findings are to be found at R. 341-353. The trial court's adoption of the specific fact findings in each claim by the commissioner and his approval of the amount of damages assessed by the commissioner may be found at R. 391-396.

Jurisdiction.

The jurisdiction of this court is based upon U.S.C.A., Title 28, Section 347 (a).

Date of Decree.

The date of the decree to be reviewed is August 14, 1936.

Statement of the Case.

For brevity, we here adopt the statement made under the heading of "Condensed Statement of Matter Involved," set forth in the beginning of the petition. Whatever other evidence may be appropriate we shall add under the points presented to which it may be specially pertinent.

The statutes involved are quoted in the Appendix.

Specification of Errors.

To avoid useless repetition, we here adopt as "Specification of Assigned Errors" to be urged, the "Reasons for Allowance of the Writ," as numbered respectively from 1 to 12, and set forth under that heading in Division II of the petition.

POINT ONE.

Charles Van Beeck, administrator of the estate of Edward C. Van Beeck, deceased, was entitled to recover the amount of damages accrued from the death of the son to the death of the mother, as found by the commissioner.

(Based on reasons for allowance of writ and specification of assigned errors Nos. 1 and 2.)

The deceased, Edward C. Van Beeck, was the son of Jennie Royakers; was mate on board the "Edgar F. Coney," and was drowned on January 27, 1930; and as stipulated by counsel he was contributing to his mother of from $30.00 to $50.00 per month (R. 163). The mother qualified as administratrix, and filed and prosecuted her claim in this cause until her death on July 31, 1931, whereupon a substitute administrator was appointed and continued the prosecution of the claim under the express order of the trial court (R. 390).

The commissioner assessed damages accruing between January 27, 1930, and the date of the mother's death, July 31, 1931, for seven hundred dollars ($700.00) (R. 352-353). The commissioner found facts, and expressly limited the pecuniary loss to the extent of the lifetime of the mother. The District Court approved said fact finding, and did not disapprove the amount at which the damages were assessed by the commissioner, but denied recovery to the administrator on the alleged point of law that the mother's death abated the cause of action from its inception, with respect both to the damages accrued up to the date of the mother's death as well as

thereafter. The trial court's ruling was affirmed by the Circuit Court of Appeals (R. 454-455). Both lower courts based their ruling on the supposed holding by the Supreme Court in *Chicago, Burlington & Quincy R. R. Co.* v. *Wells-Dickey Trust Company*, 275 U. S. 161 (R. 455).

Both courts were clearly in error for the reason that the cause of action vested at the death and that part of the cause of action that had accrued up to the date of the mother's death is not subject to abatement or forfeiture (45 U.S.C.A., Section 51).

The statute provides in case of the death of the employee that the cause of action vests for the benefit of the surviving widow or husband and children of such employee; and if none, then such employee's parents. The undisputed evidence shows that Edward C. Van Beeck was not married, that he had no surviving wife nor children, and that his father was dead; therefore, his mother was the only surviving member of the class in whom the statute vested the cause of action upon the death of the son.

The *Wells-Dickey Trust Company* case, *supra*, supports the right of the administrator to recover. However, the facts of that case were entirely different from those here involved. There, one Anderson was killed and shortly thereafter his mother died, before an administrator was appointed and before the filing of any suit. Moreover, the administrator appointed later did not bring the suit for the benefit of the mother nor for her estate, but on behalf exclusively of the sister of Anderson; the state court having permitted recovery, the judgment was

reversed by this court, which held that the cause of action vested exclusively in the mother; that the statute did not give the sister a right of action, but that such right had already vested under the statute in the mother, and that, therefore, there could be no shifting nor divestiture.

If the mother had been dead at the time of the death of her son, then the cause of action would have vested under the statute in the sister; and such is the holding by this court.

In numerous cases the courts have allowed recovery for estates of deceased beneficiaries under similar statutes.

In *Union Steamboat Company* v. *Chaffins' Administrators,* 204 Fed. 417, the Circuit Court of Appeals for the Seventh Circuit holds, quoting from a New York case, as follows:

> "The right to such damages which thus accrues became an asset of the estate of the beneficiary designated by the statute, and the death of such beneficiary does not prevent nor terminate a right of action to recover damages which have thus been by him suffered," citing *Matter of Mekin* v. *Brooklyn H. R. R. Co.*, 164 N. Y. 58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635.

The New York Court of Appeals in *Sider* v. *General Electric Company,* 237 N. Y. 64, 143 N. E. 792, 34 A. L. R. 158, holds, quoting from syllabus, as follows:

> "Damages to be allowed to the widow of one killed by another's negligence, where she dies before trial of the action, are to be limited to the pecuniary loss sustained by her until her death."

In *The City of Rome*, 48 Fed. (2d) 341, 342, the court fully discusses this question, citing the *Union Steamboat Co.* v. *Chaffins' Administrators, supra,* and *Chicago Burlington & Quincy R. R. Co.* v. *Wells-Dickey, supra,* and other cases, and holds that the right of the beneficiary to damages to the date of death does not abate with the death of such beneficiary, but that damages may be recovered up to the time of the death.

POINT TWO.

The concurrent fact findings of the commissioner and of the District Court were, under the established practice in this court and in all of the lower courts, binding and conclusive upon the Circuit Court of Appeals.

(Based on reason for allowance of writ and assigned error No. 3.)

All parties assented to the hearing and determination by a commissioner of all fact issues relating to damages and the amounts to be assessed, and unanimously agreed upon Samuel C. Lipscomb to act as commissioner to hear and determine the damages and he was appointed by the court (R. 50). All of the witnesses appeared before the commissioner personally and their oral evidence was taken before him, except only as to the Nelson and Van Beeck claims (see oral testimony, R. 50-341; deposition testimony in Nelson claim, R. 147-162; and stipulation by counsel as to Van Beeck claim, R. 162-163).

The commissioner made specific fact findings and assessed the amount of damages based thereon, and duly made his report to the court (R. 341-353). All parties having filed their exceptions to the commissioner's report (R. 353-389), the trial court overruled all of said exceptions, adopted all of the specific fact findings made by the commissioner and approved the respective amounts of damages recommended (R. 391-396), and in accordance therewith entered final judgment (R. 396-400), except only as to the claim of the administrator, Edward C. Van Beeck, which was wholly denied (final decree, R. 397-400).

As more specifically shown under "Condensed Statement of Matter Involved," comprising Section I of the foregoing petition, claimants produced, at the trial before the commissioner, Mitchell, a thoroughly qualified insurance actuary, who made mathematical calculations of the respective present worths of the amounts being contributed by the decedents to their families, based upon the undisputed evidence that had already been adduced, showing the respective ages of the decedents and beneficiaries, their joint life expectancies, etc., and based on the rate of interest that was reasonably appropriate, in the circumstances, in the opinion of the actuary, to-wit, at three and one-half per cent (3½%); said opinion as to the rate standing in the record as undisputed and correct, inasmuch as no other actuary or expert was produced by the Sabine Towing Company at the trial.

Not only was there ample evidence to sustain, but the undisputed evidence supported, the following basic ele-

ments upon which Mitchell calculated the present worths, to-wit: 1. The amount being earned by each decedent, the testimony of claimants in each case being corroborated by Ball, the president and general manager of the company (R. 319); 2. The amount reasonably necessary for the personal expenditures and probably actually used by the decedents, the sum of twenty-five dollars ($25.00), as testified to by Ball, being agreed to by claimants, and the remainder of the earnings in each case being contributed to the wife and family; 3. The ages of decedent and wife or beneficiary and the joint life expectancy as thereon calculated by Mitchell; 4. And finally three and one-half per cent (3½%) as the reasonable and correct rate of interest to be used in making the calculations.

Mitchell gave the reasons underlying his opinion that the three and one-half per cent (3½%) rate should be used, to-wit, that the larger insurance companies in the east were using three per cent (3%) and the mid-continent insurance companies were using three and one-half per cent (3½%) (R. 181), that is, that the insurance companies conducted their business on the theory that their extensively ramified investments would earn on an average of from three (3) to three and one-half per cent (3½%); and that claimants being inexperienced in investments could probably not invest their money safely at a greater rate than the major insurance companies (R. 220-221). *Chesapeake & Ohio Ry. Co.* v. *Kelly, Administratrix,* 241 U. S. 485, 36 S. Ct. 630, 632.

The Circuit Court below did not base its action in reducing all of the awards on any evidence nor the

weight nor the preponderance of the evidence in the record, but merely mentioned some of the undisputed evidence and then apparently threw it aside, or substituted its own opinion and conjecture. One of the many evidences of this is shown by the following excerpt from the opinion:

> "There are certain features common to all the claims. Claimants offered an insurance actuary as a witness. He testified as to the joint expectation of life of the deceased and beneficiary. Since there is no evidence in the record to the contrary, we must accept that testimony as part of a reasonable basis for the determination of the amount to be awarded in each case. The actuary also testified as to the present value of money capitalized at three and one-half per cent (3½%) and four per cent (4%) per annum interest. On this testimony claimants contend that they should have been awarded damages on the present value of the amount of actual income lost for the joint expectancy of life capitalized at three and one-half per cent (3½%)" (R., bottom page 448, top page 449).

It is to be noted that the lower court, as appears in the above quotation, announced in advance that although Mitchell's testimony was uncontradicted, the court would accept the testimony only as a "part of a reasonable basis" for determining the amounts to be awarded. What might have been the other part that the court used as a further basis was never disclosed in the opinion, but whatever it was, it could have come only out of the court's own mind as pure conjecture.

What should be the rate of interest used in the calculations depends upon the particular circumstances

and proof in each case. In *Chesapeake & Ohio Ry. Co.* v. *Kelly*, *supra*, the Supreme Court fully discussed the underlying principles; and these identical principles were deliberately and conscientiously followed by counsel in the preparation of the evidence relating to damages in the case at bar; and we think it not out of place here to say that if courts are permitted thus arbitrarily to throw the reasonable and undisputed evidence aside in determining the issues, then counsel ought not to be put to the trouble and expense of adducing the evidence, in the first place.

The parties having unanimously agreed upon the said Lipscomb as commissioner to hear and determine the facts and amount of damages, the trial court entered the following order:

> "It is further ordered that Samuel C. Lipscomb, Esquire, be and he is hereby appointed commissioner herein to take and hear the testimony on the amount of the damages claimants have sustained and to determine the amount thereof. It is further ordered that this cause be and is hereby referred back to the said Samuel C. Lipscomb, Esquire, duly appointed commissioner herein, to take further proof that may be offered as to the amount of damages sustained by every and all of the claimants herein and report thereon to this court with the evidence taken before him with respect to the various claims for death and with his opinion in addition as respects the amount of the damages, etc." (R. 49-50).

The trial court reviewed the evidence and after full consideration of the report, overruled all of the exceptions and adopted the findings of the commissioner as the

court's findings and in each instance approved and adopted the amount of the damages assessed and recommended by the commissioner (R. 391-395).

In the circumstances above detailed, the findings of fact and the assessment of damages by the commissioner, duly approved by the trial court, are conclusive, because all findings were amply supported by the evidence, in which there is not to be found any substantial dispute, and none was pointed out or adverted to by the Circuit Court.

In *Davis* v. *Schwartz*, 155 U. S. 631, 15 S. Ct. 237, 239, the Supreme Court laid down the rule specifically applicable to the facts at bar, in the following language:

> "As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a Circuit Court in a case tried by the court under Revised Statutes, Section 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable. *Wiscart* v. *Dauchy*, 3 Wall. 321; *Bond* v. *Brown*, 12 How. 254; *Graham* v. *Bayne*, 18 How. 60, 62; *Norris* v. *Jackson*, 9 Wall. 125; *Insurance Co.* v. *Folsom*, 18 Wall. 237, 249; *The Abbotsford*, 98 U. S. 440.

"The question of the conclusiveness of findings by a master in chancery under a similar order was directly passed upon in *Kimberly* v. *Arms*, 129 U. S. 512, 9 Sup. Ct. 355, in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet, where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court. 'Its findings,' said the court, 'like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed, under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.' As the reference in this case was by consent to find the facts, we think the rule in Kimberly v. Arms applies, and, as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive. To same effect are *Crawford* v. *Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759; *Furrer* v. *Ferris*, 145 U. S. 132, 12 Sup. Ct. 821."

In *The Eastland* (CCA 7), 78 F. (2d) 984-988, the Seventh Circuit aptly states the same rule as follows:

> "Many of the objections which are here raised by appellants relate to the sufficiency of the evidence to support the findings of fact which were made by the commissioner and affirmed by the District Court. The rule has been too frequently stated to require repetition here, that where the special commissioner or master has heard and seen the witnesses and examined all of the exhibits and the court has affirmed the findings of the commissioner or master, their findings of fact are conclusive upon this court upon appeal, if there is any substantial evidence to support them." Citing various well-considered cases.

In *The June Ames* (CCA 2), 66 F. (2d) 415, the Second Circuit follows and states the same rule:

> "As to the damages for repairs, we are not disposed to interfere. The issue depended upon whom to believe and the commissioner's finding in such a case, certainly when confirmed by the judge, is conclusive. This seems a hard lesson for the Bar to learn, but we will not slacken our rule regarding it."

This lesson seems equally difficult for some courts: *Packard* v. *Southern States Power Company* (CCA 5), 46 F. (2d) 789. In this case Judge Foster, who also wrote the opinion in the case at bar, applied the general rule above stated and refused to review the evidence.

POINT THREE.

In holding that, as a matter of fact, notwithstanding all of the evidence to the contrary, the families would have received only one-half of the money salaries being earned by the decedents, the court below violated the fundamental principle that judgments must be based upon the evidence and not upon mere conjecture.

(Based on reasons for allowance of writ and assigned error No. 4.)

The wives all testified that the checks for the salary of the respective husbands were delivered to them and that all of the money was used for the benefit of the family, except from ten dollars ($10.00) to fifteen dollars ($15.00) of it, which was used by the husband as a necessary personal expenditure (Ora Kenney, R. 53; Sophia Brennan, R. 75; Mrs. Durio, R. 110; Mrs. Pyle, R. 98).

Ball, president and general manager of Sabine Towing Company, testified as an expert on the point that, in his opinion, it would require at least twenty-five dollars ($25.00) a month to cover the necessary personal expenditures of each member of the crew (R. 309).

The above constituted all of the testimony, either direct or circumstantial, bearing on this fact issue, which the commissioner found in accord with Ball's testimony, that it would require at least twenty-five dollars ($25.00) a month as the personal expenditures for those that were not officers and slightly more for the officers (R. 344-345).

The amounts of money actually earned as salaries by the husbands and paid over by the company to their

respective families were not in dispute, nor the fact that these money salaries were over and above the value of the board and room also received by the members of the crew as part of their salaries. These undisputed money salaries were the amounts used by Mitchell in his calculation, as shown by the tabulation set out in the petition at page 7; and as also shown in the "Tabulation of earnings of members of the crew tug Edgar F. Coney, etc.," same being a copy of the records of the company (R. 319).

Notwithstanding this undisputed evidence, and the fact findings by the commissioner and the adoption and approval thereof by the trial court, the Circuit Court, without any evidence, found this fact as follows:

> "We consider it to be a fair estimate to say the family had lost an amount equivalent to one-half of what the husband and father earned" (R. 450).

The court neither cites nor discusses any evidence upon which to base such finding; and the only reason it advances for the holding is the following statement immediately preceding the holding:

> "Assuming the testimony of the widows to be truthful, it is beyond dispute that the husbands, upright, faithful and devoted, derived as much benefit from the upkeep and happiness of the family as did the wives" (R. 450).

In the first place, this is mere whimsical conjecture. But if it could be possibly imagined to have any reasonable application at all, it would be only during the lifetime of the husbands, but their death changes the whole

matter. After they were dead how could they derive any benefit? Their negligent deaths alone gave rise to the claims here asserted.

Too frequently has this Honorable Court found it necessary to overthrow judgments based not on evidence but on mere conjecture, as in the instant case. In *Norfolk & Western Ry. Co.* v. *Holbrook*, 235 U. S. 625, 35 S. Ct. 143, 145, the court said:

> "There was no occasion to compare the rights of the actual beneficiaries with those of supposed dependents; and we think the trial court plainly erred when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin. This gave the jury occasion for indefinite speculation, and rather invited a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts. *Merchants Mut. Ins. Co.* v. *Baring*, 20 Wall. 159, 161, 22 L. Ed. 250, 251."

If juries are thus so strictly prohibited from basing their verdicts on speculation and conjecture, assuredly learned and responsible courts should exercise the most rigid self-restraint in the same matters; and their failure to do so calls for the exercise of this court's power of supervision. *Brooklyn Eastern Terminal* v. *United States*, 287 U. S. 170, 53 S. Ct. 103, 105.

POINT FOUR.

The rate of three and one-half per cent (3½%) was shown by the uncontroverted testimony to be the proper and reasonable rate for calculating the present worths of the money contributions, and the Circuit Court, in disregarding this testimony and using six per cent (6%), committed fundamental error.

(Based on reason for allowance of writ and specification of error No 5.)

Mitchell, the actuary, stated that he "considered three and one-half per cent (3½%) to be a reasonable and correct rate, under the circumstances" (R. 181). He based this opinion on the fact that the large companies of New York and of the east generally proceeded on a basis of three per cent (3%) for calculating annuities and that the large mid-continent insurance companies were on a basis of three and one-half per cent (3½%) (R. 181); and that this meant the business of said companies was organized on the theory that by reason of their extensive and varied investments, they would obtain an average return of from three to three and one-half per cent.

Mitchell also testified, without any dispute in the evidence, that the present worths of the money contributions to the families, as calculated for the periods of the respective joint life expectancies, would be the present worths of said amounts if they had been paid at the date of the deaths, to-wit, the 28th day of January, 1930; but that it was necessary, in view of the delay in payment to calculate the interest on said amounts arrived at, as

shown in his tabulation in the petition from the date of the deaths up to the date of the actual payment or up to the date he was making the calculation, which was a period of approximately five years from the date of the deaths; also, that this interest should be calculated at the same rate as used in calculating the present worths (R. 181-185).

The reason why it was necessary for the actuary to add interest for five years to the present worths is that in calculating those present worths it must necessarily be assumed that they are to be paid immediately on the death of the husband; but at the time he was making these calculations five years had already passed and now it has been nearly seven years. This takes seven years off the life of each beneficiary and it can be neither replaced nor recalled. If only the present worths, without adding the interest for the delayed period, were allowed the petitioners, each one of them will lose approximately seven years' contributions to which they were entitled, because each one will die, in all probability, in accordance with the calculated joint life expectancy, and whether they purchase an annuity or whether they put the money in the bank at interest, they lose absolutely the contributions for the delayed period. But adding this interest must not be confused and identified with allowing interest on a judgment, because there is no legal nor logical relation between them.

Not one of these petitioners has had any experience in investing money; and each is ignorant of the dangers of losing both interest and investment. Certainly those inexperienced, such as are the beneficiaries here, could

not safely loan their money at a greater rate of interest than the standard insurance companies throughout the United States, and the undisputed evidence shows that such companies make their investments and calculations on the basis that they are to receive three and one-half per cent (3½%) interest in the mid-continent and three per cent (3%) in the east.

The Circuit Court brushed aside the undisputed evidence showing that three and one-half per cent (3½%) rate should be used in calculating the present worths and again indulged in pure conjecture, itself bringing into the record by its own testimony not a few facts wholly immaterial to any issue, such as: "The legal rate of interest in Texas is ten per cent (10%) per annum. Doubtless many well secured loans are made at that rate. United States bonds as a rule do not pay more than three per cent (3%), but there are many state bonds and sound industrial securities that pay at least six per cent (6%) per annum interest. Courts are not bound to adopt either the highest or the lowest rate of interest in determining the amount to be awarded" (court's opinion, R. 449).

The record in this case does not permit such indulgent speculation by the court as to the facts. The record itself shows the facts underlying this issue and there is no evidence whatever to support or justify these conjectures by the court.

In *Chesapeake & Ohio Ry. Co.* v. *Kelly*, 241 U. S. 485, 36 S. Ct. 630 at 632, the Supreme Court discussed and laid down, or at least clearly suggested, the principles

underlying this identical matter, using the following language:

> "Savings banks and other established financial institutions are in many cases accessible for the deposit of moderate sums at interest, without substantial danger of loss; the sale of annuities is not unknown; and, for larger sums, state and municipal bonds and other securities of almost equal standing are commonly available. * * * But, as a rule, and in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award. We do not mean to say that the discount should be at what is commonly called the 'legal rate' of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed, the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return."

The foregoing is authority for the proposition that the rate of interest to be used in calculating the present worth of money depends upon the circumstances of each particular case, and, therefore, upon the evidence of the record relating to the issue. In the case at bar, the evi-

dence shows no financial experience and skill on the part of the beneficiaries in making investments, and the rate to be used should be such at which these inexperienced people can make safe and liquid investments. The basic theory underlying the present worth of money is that not only all of the actual or monthly interest, but also a part of the principal will be consumed each year and that at the expiration of the joint life expectancy both principal and interest will be completely exhausted (Mitchell, R. 182).

The only testimony adduced by the Sabine Towing Company was through its witness, Weatherall, and the substance of his testimony is as follows: That if the investment must be both safe and liquid, usually only a low rate of interest can be obtained; that government bonds being not only safe but liquid bear a low rate of interest; that the next class would be municipal bonds not so liquid as government bonds, but would earn a larger rate, then would come the listed bonds not so safe, bearing a still higher rate (R. 337).

On cross examination he testified that fifteen year government bonds bearing three per cent (3%) could be obtained, but that short term bonds, or one year bonds, would earn only about one-half of one per cent, and the five or ten year bond, one per cent (1%); that his bank would pay two per cent (2%) on savings deposited, and that the banks had paid as much as three per cent (3%) on savings (R. 339); that his bank would pay only two per cent (2%) on five thousand dollars ($5,000.00) and

above that only one per cent (1%) (R. 339). He stated that money could be safely invested over a long period of time at the rate of about five per cent (5%), but municipal bonds have gradually been growing less and that municipal and independent school district bonds probably pay about four and three-fourths per cent (4¾%) (R. 337-338).

Government savings bonds, if kept for a period of ten years, pay two and nine-tenths per cent (2.9%), but it would be impossible for these people to invest any substantial part of their money in such bonds, because they must be constantly using not only the interest but a part of the principal. There is now scarcely an investment that would be considered both safe and liquid—that is, where part of the principal could be obtained at any time—that will pay as much as three per cent (3%).

The difficult conditions of both sound and liquid investments are well stated in *Hines* v. *Mills*, 218 S. W. 777 (writ of certiorari denied by Supreme Court of the United States, 41 S. Ct. 447), in which the Texarkana Court of Civil Appeals of Texas said:

> "The argument is made that $40,000.00 loaned at eight per cent interest yields a return greater than the entire income Mills was receiving at the time of his death or had any prospect of receiving by virtue of future promotion, but the rule applied in the argument above referred to is not, for a different reason, a safe guide. It is by no means certain that the amount recovered by this judgment can be con-

> stantly loaned so as to yield eight per cent interest annually and upon a security which involves no risk of loss of any part of the principal. Assuming that eight per cent is the usual rate of interest at which money is loaned we cannot overlook the fact that such loans involve more or less a hazard, which sometimes causes a loss of part or all of the principal loan. Investments which are considered absolutely safe yield a much lower rate of interest than four per cent per annum."

The foregoing, we think, proves conclusively from the record that Mitchell's opinion that three and one-half per cent (3½%) was the reasonable rate is correct and that the lower court's arbitrary use of six per cent (6%) would be wrong, even if there was some evidence to support the assumption. The looseness and abandon with which the lower court handled the record facts is shown by the following excerpt from the opinion:

> "Claimants offered an insurance actuary as a witness. He testified as to the joint expectation of life of the deceased and beneficiary. Since there is no evidence in the record to the contrary, we must accept that testimony as part of a reasonable basis for the determination of the amount to be awarded in each case" (R. 448-449).

Then the court proceeded to use six per cent (6%), in total disregard of the actuary's testimony to the contrary.

Brooklyn Eastern District Terminal v. *United States,* 287 U. S. 170, 53 S. Ct. 103, 105.

POINT FIVE.

If the evidence shows that the parents are qualified, as it does in the case at bar, the pecuniary value of the nurture and loss of intellectual, moral and physical training of the children should be estimated, as a matter of law, from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00); and this is a separate and distinct item from the present worth of the money contributions, and should not be subtracted from but allowed over and above the present worths.

(Based on reasons for allowance of writ and specifications of assigned errors Nos. 6 and 7.)

The parents were all shown by the undisputed evidence to be home-loving, attentive and kind to their wives and children. This fact was expressly recognized and found by the commissioner, the lower court and by the Circuit Court; the latter court describing them as "upright, faithful and devoted" (R. 450).

Sophia Brennan and her husband had three children, ages eight, six and three, respectively, and she testified that her husband was always talking to his children, teaching them to do the right thing, always correcting them; that he loved and was unusually affectionate toward them and that his whole heart and soul were wrapped up in them (R. 6-7).

Ora Kenney and her husband had two children, ages ten and six, and she testified that her husband was an ideal father, had high ambition for his children, expected to educate them and make them law-abiding citizens; that

he associated with them all the time that he was off work and that he and the children were very affectionate toward one another (R. [illegible]).

Mrs. Adolphine Durio and her husband had six children, three of them being minors at the time of the father's death, of the ages sixteen, thirteen and nine, respectively, and she testified that her husband associated with and loved his children, and undertook to teach them the difference between right and wrong, was always with them when he was off duty and he was working for his children to send them to school and to educate them. (R. 110).

The evidence further shows that in the midst even of the depression they were not only kept in their employment, but their salaries were being raised. Ball, the president and manager of the company testified that they were unusually capable, sober and dependable men. The evidence shows that Brennan, Kenney and Pyle had been in the employ of the company for several years and were all along being promoted; that they had survived the disasters of the depression, probably on the principle of the survival of the fittest, and had been employed continuously and were even being promoted throughout the depression. In fact, the record leaves no doubt that these fathers were much above the average of their class and both disposed and fit to bring up their children properly and that the children have been actually deprived of such advantages.

In *Chicago C. R. Co.* v. *Vreeland*, 227 U. S. 58, 57 L. Ed. 417 at 423, the Supreme Court has expressly recognized the value of the parental nurture and care of the child by the parent, whether father or mother, "if there be evidence of the fitness of the parent, and that the child has been actually deprived of such advantages."

In *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404, the Second Circuit, after stating that "the commissioner might take into account the pecuniary value of the nurture of the child and allow for its loss of intellectual, moral and physical training," held that an allowance for a minor, in addition to the present value of the decedent's contributions to the family, in the sum of four thousand five hundred forty dollars ($4,540.00) was reasonable and not excessive.

In 74 American Law Reports at pages 95 and 103 the rule is stated (page 103) as follows:

> "In this connection, it is interesting to note that the court in *Southwest Power Company* v. *Price* (1929), 180 Ark. 567, 22 S. W. (2d) 373, 218 U. S. 703, 74 L. Ed. 1128, 50 S. Ct. 253, 281 U. S. 753, 74 L. Ed. 763, 50 S. Ct. 407, held that a verdict of from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00) would not be excessive compensation for loss of parental love, care and training.
>
> "In this case the Supreme Court of Arkansas, in affirming this verdict for thirty thousand dollars ($30,000.00) at page 376 said:
>
> > 'It is said that the verdict is excessive and while it is a very substantial sum, we have reached the conclusion that we cannot say, as a matter of law, that it is excessive. It is a matter

> of simple arithmetic to determine that the present value of an annuity of thirteen hundred eighty dollars ($1380.00) held for a period of forty (40) years would be a sum in excess of twenty-seven thousand dollars ($27,000.00), depending upon the rate of interest, and in addition to the pecuniary loss sustained by the widow and child, the child is entitled to a reasonable sum for the loss of parental love, care and training. The verdict was for a gross sum and we cannot tell how much was awarded for pecuniary loss and how much for parental care, but it certainly could not be said that a judgment of from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00) for this purpose would be excessive.' "

As a matter of law, the commissioner, the trial court and the Circuit Court all erred in this respect: First, in not awarding each of the minors a sum of from three thousand dollars ($3,000.00) to five thousand dollars ($5,000.00) for this particular loss and awarding it as a separate and distinct item of itself over and above the present worth of the money contributions; second, in deducting whatever award was made for this item in each case from the present worth of the money contribution.

As demonstrating beyond any doubt that they did not award the children any separate amount for the loss of parental education, moral training, nurture, etc., we direct the court's attention to the fact that Bertha M. Pyle, who had no children was awarded twenty thousand dollars ($20,000.00), and they awarded Sophia Brennan and her three minor children twenty-one thousand dollars ($21,000.00); each of these awards being practically one-half of the calculated present worths of the money

contributions. The present worths of the Brennan and Pyle claims were substantially the same, resulting from the facts that the joint life expectancy in the first was twenty-four years and in the second twenty-five years, although the money contributions to the family were slightly different, being one hundred seventy-five dollars ($175.00) in the Brennan claim and one hundred sixty-five dollars ($165.00) in the Pyle claim.

POINT SIX.

In the Causey claim the father's common-law right to the earnings of his child during minority did not enter into nor become a part of the award made to the father and mother. The evidence shows that the present worth of the minor's actual money contributions of twenty dollars ($20.00) a month during the joint life expectancy was the sum of three thousand four hundred thirty-one and 15/100 ($3,431.15) dollars (R. 215).

(Based on reason for allowance of writ and specification of error No. 8.)

The commissioner's explanation of the basis upon which he made the award in this claim shows affirmatively that the parents' common-law right to the wages of the minor child did not enter into nor become a part of the amount of three thousand dollars ($3,000.00) that he found, as shown by his statement, as follows:

> "The father was infirm. The boy was bright and intelligent and showed an affectionate regard for his parents, and it is but natural to assume that he would have been of material assistance to them, regardless of any legal obligation for their support.

Taking into consideration his natural affection, his prospects of future advancements and personal service he might render to his aged parents in their declining years, the award in this case is fixed at three thousand dollars ($3,000.00)" (R. 352).

POINT SEVEN.

When the commissioner determined and assessed the amount of the awards the damages became liquidated, subject only to the District Court's approval, and the trial court acted clearly within its reasonable and discretionary powers in finding as a fact, under all the circumstances, that interest should run, and in decreeing that it should run, from the date of the filing of the commissioner's report.

(Based on reasons for allowance of writ and specification of assigned errors Nos. 9 and 10.)

The Circuit Court reversed and rendered this part of the decree in the following language:

> "The judgment awarded interest to the claimants at the rate of six per cent per annum from February 28, 1935, the date of the filing the commissioner's report. The report merely recommended the amounts to be awarded and did not fix the liability of the company. The act does not provide for interest before the damages are determined. *Cortes* v. *Baltimore Insular Line*, 66 F. (2d) 526. In admiralty the allowance of interest is discretionary with the court. In this case interest should be allowed at the rate of six per cent per annum from July 18, 1935, the date the decree was entered in the District Court" (R. 455).

The court thus expressly recognizes the rule that "in admiralty the allowance of interest is discretionary

with the court;" but it erroneously construes the rule as meaning that this "discretionary power" is exclusively in the Circuit Court.

Also, we think the court below erred in holding that the effect of the commissioner's report was merely to recommend the amounts to be awarded and did not fix the liability of the company, as being unnecessarily restrictive in construing the statutes involved, which contain nothing to indicate that interests should not be awarded in any case, regardless of circumstances, from the date of the filing of the commissioner's report.

The assessment of the damages by the commissioner fixes and liquidates the amounts subject only to the approval of the District Court, which usually follows as a matter of course and of mere technical procedure.

The respondent here attempted to assign error to this action of the trial court; but the assignment is insufficient because it fails to show abuse of the court's discretion. The said assignment was designated "Tenth" and was of the tenor following:

> "The court erred in allowing interest on damages from date of the commissioner's report" (R. 406).

The courts have uniformly held that it is within the discretion of the court to allow interest from the time that the claim has been liquidated; also, that a claim is liquidated at the time the commissioner's report is filed with the court, and that an abuse of discretion must be shown, and no abuse of discretion is alleged in the above assignment of error.

In *Union Steamboat Company* v. *Chaffins' Administrator* (CCA 7), 204 F. 412, 420, the court says:

> "From the cases examined, we are of opinion that, under the circumstances of this case, the trial judge did not abuse the discretion vested in him in allowing interest from the time when the report was completed. By the decision of the District Court the finding of the commissioner as to the amount of the several claims was approved. It thus appeared that the amounts found by the commissioner were correct and were liquidated for all purposes of the present inquiry."

In support of the above statement the court cited several cases from the Circuit Court of Appeals and from the Supreme Court on allowance of interest under similar circumstances. This case has been approved and followed on the allowance of interest in *Chicago, D. G. & B. Transportation Company* v. *Moore* (CCA 6), 259 F. 490, 507; *Union Steamboat Company* v. *Fitzgibbon,* (CCA 7) 261 F. 768; *The Argo,* (CCA 9) 210 F. 872.

The court below cites as supporting its holding, *Cortes* v. *Baltimore Insular Line,* (CCA 2) 66 F. (2d) 526. This case holds the judgment in that case "was erroneous in including interest on the verdict from the date of death," and that "neither the Jones Act nor the Federal Employers' Liability Act (45 U.S.C.A., Sections 51-59) permits the awarding of interest before the damages are judicially ascertained." Citing several cases, among them being *Chicago, M. St. P. & P. R. Co.* v. *Busby,* (CCA 9) 41 F. (2d) 617, involving injuries to a railroad employee, wherein the court cited *Chesapeake & Ohio Ry. Co.* v.

Kelly, 241 U. S. 485, 33 Sup. Ct. 630, 60 L. Ed. 1117, and quoted from the latter case the following:

> "But the question on proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employers' Liability Act it must be settled according to general principles of law as administered in the federal courts."

Then the court in the Busby case continues:

> "Treating the question, then, as one of general law, our own decisions are controlling. In *Burrows* v. *Lownsdale* (CCA), 133 F. 250, and *The Argo* (CCA), 210 F. 872, it was held that the interest is not allowable on claims of personal injuries until the amount of damages has been judicially ascertained, distinguishing such cases from actions for loss of or injuries to property."

It is neither clear nor convincing upon any sound principle that property should be regarded (if it is) by the courts as more important or sacred than human life. In both the damages are, as a rule, equally unliquidated until judicially determined.

The Argo, supra, holds that the damages are liquidated upon the assessment thereof by the commissioner on the filing of the report.

In *La Bourgogne* (*Deslions* v. *La Compagnie, etc.*) 210 U. S. 95, 28 S. Ct. 664, 673, 52 L. Ed. 973, 986, there was judgment for loss of property as baggage, and interest was allowed from date of collision and sinking of the ship.

The foregoing cases present a sharp conflict on this issue and it is a matter that should be definitely settled

by this Honorable Court. There is nothing in these statutes to indicate that they should not have a sufficiently liberal construction to permit the running of interest either from the date of the personal injury, or death, or the filing of the commissioner's report assessing damages; and there is no sound reason why the same rule should not apply equally to injury to the person and damage to property. Liberal construction requires the putting aside of purely technical distinctions between the words "liquidated" and "unliquidated."

POINT EIGHT.

In view of the undisputed elements entering into the calculations of the present worths of the money contributions in the case at bar, the commissioner and both lower courts were required, as a matter of law, to determine the compensatory damages sustained in each case in accordance with this mathematical evidence as being the most accurate and trustworthy criterion.

(Based on reason for allowance of writ and specification of assigned error No. 11.)

It has been heretofore shown by citations from the record that all of the necessary and appropriate elements entering into the present worth calculations by the actuary, Mitchell, were established by the uncontroverted evidence; and this being so, the courts below should have followed unflinchingly the mathematical results as being the best and most accurate evidence of the extent of the damages suffered and of the compensation con-

templated and provided by the statute. In such undisputed circumstances, the said respective present worths absolutely and accurately determined the amounts that should be awarded by the courts.

Both the commissioner and the trial court found the facts and actually calculated the present worths and properly used the three and one-half per cent (3½%) rate in making the calculations in accordance with Mitchell's undisputed testimony, and also used all of the other undisputed elements in calculating the present worths such as the earnings of decedents and contributions to their families, the ages and joint life expectancies (commissioner's fact findings, R. 348-352; trial court's identical fact findings, R. 391-395). These unquestionably constituted fact findings in accordance with Admiralty Rules 43½ and 46½ and in harmony with the construction of these rules in *The Vallescura*, 293 U. S. 296, 55 S. Ct. 194, 195.

Notwithstanding both the commissioner and the trial court found the facts as aforesaid and properly calculated the present worths of the money contributions to the families, they balked at following this mathematical evidence to its logical conclusion; but, on the contrary, cut all of the higher present worths by substantially half, without any evidence to justify such reductions, and all of the reasons suggested by the commissioner as an excuse for such drastic cuts of the present worths are clearly whimsical and arbitrary, as specifically pointed out in "Claimants' Exceptions and Objections to the Report of the Commissioner" (R. 360 to 389), all of which were overruled by the trial court (R. 391).

In *Chesapeake & Ohio R. Co.* v. *Kelly, supra,* this court, with respect to this identical point, said:

> "*Where future payments are to be anticipated and capitalized in a verdict that plaintiff is entitled to no more than their present worth is commonly recognized in the state courts*" (36 S. Ct. 633).

In support of this, many cases by various state courts are cited.

The quotation above states that no more than the present worth is commonly recognized; and conversely, it necessarily follows that no less than the present worth is allowed. As a matter of fact, apparently all of the decided cases have uniformly held that at least the present worth of the money contribution should be awarded.

In *Briscoe* v. *United States* (CCA 2), 65 F. (2d) 404, damages were allowed to the full amount of the calculated present worth of the money contribution, with additional allowance of $4540.00 to the child for loss of parental nurture, care and training, etc.

The following cases further illustrate that the courts have usually followed this principle in allowing and estimating damages:

Clyde Steamship Co. (D. C.), 16 F. (2d) 930 (affd. 18 F. (2d) 1015, certiorari denied, 48 Sup. Ct. 21); *The Columbia* (D. C.), 25 F. (2d) 516 (affd. 25 F. (2d) 518, certiorari denied 48 Sup. Ct. 530); *Drowne* v. *Great Lakes Transportation Co.* (CCA 2), 5 F. (2d) 59; *United States* v. *Boykin* (CCA 5), 49 F. (2d) 762.

In the Boykin case, last cited, *supra,* the Circuit Court for the Fifth Circuit followed the same rule and method in estimating the damages as being the calculated present worth of the money contribution, and reduced the judgment to harmonize with that amount.

In the case at bar the commissioner, with respect to the claims involving the larger damages, cut the present worths substantially one-half, and then deducted from the one-half allowed, the awards to the minors. Then the Circuit Court, apparently vying with the commissioner, again cut by one-third or more the awards made by the commissioner in the larger cases, and reduced practically all the other allowances by more than one-half. All these cuts from the present worths, both by the commissioner and by the Circuit Court, were made without any substantial reason or basis and against all the evidence. The contention here made by the petitioners that the awards in each instance should have been the amount representing the present worth, and that this Honorable Court should so find, is not at all inconsistent with the principle that, in the circumstances shown, the awards made by the commissioner and approved by the District Court were absolutely conclusive upon the Circuit Court to the extent of the amounts actually awarded, that is, that the said awards should not be reduced, but that they should be increased so as to harmonize with the present worths in each case as shown by the evidence, for the simple reason that the said present worths were calculated and accurately shown in accordance with the undisputed testimony.

In *The Spokane* (CCA 2), 294 F. 243, 247, the Circuit Court adverted to the loss of wages and money contribution up to the time of the entry of judgment as being a proper consideration in the measure of damages. Using even the unwarranted basis of one-half of the monthly salary of each decedent, the petitioners have lost at the date of the judgment in the Circuit Court of Appeals the following amounts:

Sophia Brennan and her three minor children, $7,800.00; Bertha M. Pyle, $7,410.00; Adolphine Durio and her three minor children, $3,315.00; R. J. Causey, $650.00; Ora Kenney and her two minor children, $6,435.00; Ruth Nelson, $1560.00; and Ruth Anderson, $2,535.00.

Therefore, even under the Circuit Court's baseless calculations, petitioners have already lost more than one-half of the respective amounts awarded them; and in most cases, with more than two-thirds of the life expectancy yet to come.

SUMMARY.

Brooklyn Eastern District Terminal v. *United States*, 287 U. S. 170, 53 S. Ct. 103, 105, is peculiarly applicable to the case at bar with respect to the rule stated as to the use of an extravagant criterion for the measure of damages:

> "A wide range of judgment is conceded to the triers of the facts in the choice of the standard to be applied and in the method of applying it. The choice, however, may not be arbitrary, nor is the range of judgment without limit. We think that on the face of this award there is declared a principle of assessment that in the setting of the circumstances exceeds

> the bounds of any discretion allowed to the assessors. * * * An assessment of damages may be corrected if erroneous in point of law, but also it may be corrected if extravagant in fact."

"Extravagant," in its radical and literal sense, meaning wandering from proper and reasonable bounds *in any direction,* comprehends as well the idea of inadequacy as of excessiveness. In that case the court was considering excessive damages; but in the instant case, palpable inadequacy should also have this Honorable Court's equally careful consideration. The Circuit Court, against all of the evidence, cut in half all of the larger allowances, which had already been reduced by the commissioner and the trial court to one-half of the present worths. *As claimants pointed out in their exceptions, the commissioner had assigned for his action purely whimsical and arbitrary reasons and having no basis in the evidence before him; but the Circuit Court acted on its apparently declared policy with respect to all such cases, that in all cases, as a matter of fact and of law, the families would receive and were entitled to only one-half of the decedent's earnings, regardless of any evidence; that six per cent (6%) was the proper rate to use regardless of any evidence to the contrary; that the present worth should be calculated on the said arbitrary findings of that court, regardless of record evidence; and that in calculating the present worths, the petitioners are to be charged with and made to pay interest for the money that they have not received for a period of seven years, and that the respondent is to be credited with and receive benefit of interest on the money that it has been wrongfully withholding and using for seven years. All of this is extravagant and erroneous in the extreme, both in fact and in law, and should be corrected.*

CONCLUSION.

It is greatly to be desired that there should be at least reasonable and comparative "uniformity of decision" throughout the United States, and in the several Circuits, with respect to amounts allowed, under these statutes, to seamen and their families under substantially the same facts. To accomplish this, the courts must rigidly apply uniform principles both of statutory construction, and of damage calculations.

In *La Bourgogne* (*Deslions* v. *La Compagnie, etc.*), *supra*, this Honorable Court clearly pointed out the unfairness and impolicy of construing the Limitation of Liability Act with a "tight and grudging hand," as against ship owners; and what was there said is not less pertinent to the construction of the federal acts now under consideration that were enacted for the benefit of seamen.

In *The Arizona* v. *Anelich*, 56 S. Ct. 707, this court definitely laid down the true principle for the guidance of all our courts:

> "The legislation (the Jones Act) was remedial for the benefit and protection of seamen who were peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. * * * Its provisions, like the Merchant Marine Act, of which it is a part, are to be liberally construed to obtain that end * * *, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an established part."

This principle of liberal construction by this court has been uniform, as distinctly appears in the following cases:

Beadle v. *Spencer* (decided April 27, 1936), 56 S. Ct. 712; *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 375, 53 S. Ct. 173, 77 L. Ed. 368; *Jamison* v. *Encarnacion*, 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Alpha S. S. Corp.* v. *Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086; *Warner* v. *Goltra*, 293 U. S. 155, 157, 160, 55 S. Ct. 46, 79 L. Ed. 254.

English courts recognize, and have commented upon, the difference "between damages granted with a liberal and with a sparing hand." *Emblen* v. *Myers*, English 6 H. & H. 54, 158 Reprint 53.

The hand we are here condemning was "tight and grudging," "sparing" and stingy—verily, the disguised hand of Jacob.

To enforce reasonable "uniformity of decision" in these matters, and to obtain comparative results in damage awards, it would seem not merely appropriate but necessary that this Honorable Court constantly exercise its supervisory authority; and we think the case at bar should have your serious and favorable consideration, toward the attainment of these just ends.

Respectfully submitted,

M. G. Adams,
H. C. Hughes,
Counsel for said Petitioners.

Howth, Adams & Hart,
Lockhart, Hughes & Lockhart,
Of Counsel.

APPENDIX.

Merchant Marine Act, Sec. 33.

Section 33 of the Merchant Marine Act of 1920 (46 U.S.C.A., Section 688) referred to herein as the Jones Act, reads as follows:

> "Recovery for injury to or death of seaman. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. (Mar. 4, 1915, c. 153, Section 20, 38 Stat. 1185; June 5, 1920, c. 250, Section 33, 41 Stat. 1007.)"

Employers' Liability Act.

Employers' Liability Act, 45 U.S.C.A., Section 51, made applicable in case of death of seamen by the Jones Act, is as follows:

> "Liability of common carriers by railroad, in interstate or foreign commerce, injuries to employees

from negligence. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment. (Apr. 22, 1908, c. 149, Section 1, 35 Stat. 65.)"

New Admiralty Rule 43½.

28 U.S.C.A., Section 723:

Rule 43½. Report of Commissioners; Presumption as to Correctness; Review.

In all references to commissioners or assessors, by consent or otherwise, whether the reference be of all issues of law and fact, or only particular issues either of law or fact or both, the report of the commissioners or assessors shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same

in whole or in part when the court in the exercise of its judgment is fully satisfied that error has been committed: Provided, that when a case or any issue is referred by consent and the intention is plainly expressed in the consent order that the submission is to the commissioners or assessors or arbitrators, the court may review the same only in accordance with the principles governing a review of an award and decision by an arbitrator.

(This is a new rule promulgated May 31, 1932.)